Ethical Issues and the Legislative Process

Jon Heining - General Counsel - Texas Legislative Council
January 10, 2019
How Often?

140 days

Odd-numbered years
31 Senators

Population = +/- 811,000 (North Dakota = 757,952)

8,664 sq. miles (New Jersey = 8,722 sq. miles)

150 State Representatives

Population = +/- 168,000 (Brownsville = 175,000)

1,791 sq. miles (Rhode Island = 1,545 sq. miles)
Legislative Statistics

85th Regular Session (2017)

HBs and SBs Introduced = 6,631

HBs and SBs Passed = 1,211
Legislative Deadlines

- Bill filing: 86 days
- Acting on legislation: 80 days
- “Emergencies” and committee consideration: 71 days
- Administration, parties, inauguration, parties
- Session: 140 days
- Session shut-down: 21 days
119—Last HB committee report
122—2nd-reading HBs
123—3rd-reading HBs
131—Last SB committee report
134—2nd-reading SBs
135—House: 3rd-reading SBs; Senate: all HBs
136—SB amendments distributed
137—Go to conference?
138—Print all CCRs
139—Adopt CCRs and Concur
140—Corrections; Sine Die
Council Operations

85th Regular Session (2017)

Documents drafted that change law: ~22,000

Attorneys: 55
Council Operations

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IT services

Printing services

Research
Who Do We Serve?
I am invited to consider whom I regarded as my client when I was Legal Counsel to the Senate Foreign Relations Committee. Happily, I can answer succinctly: *I do not know.*

—Michael J. Glennon, 61 Law & Contemp. Probs. 21 (Spring 1998) (emphasis added)
2002 Judicial Confirmations Debate

Priscilla Owen, 5th Circuit

Charles Pickering, 5th Circuit

Miguel Estrada, DC Circuit
2001: A Legislative Odyssey

• January 2001: Republicans have complete control of government

• May - June 2001: Jim Jeffords (VT) leaves Republican Party, caucuses with Democrats
2001: A Legislative Odyssey

- July 2001: Brian Wikner becomes Senate Judiciary Committee’s network administrator
2001: A Legislative Odyssey

• September 2001: Jason Lundell becomes clerk for minority members of Senate Judiciary Committee
2001: A Legislative Odyssey

- November 2001: Wikner works on Lundell’s computer
2001: A Legislative Odyssey
2001: A Legislative Odyssey

“Hacker”
2001: A Legislative Odyssey

Alex Dahl
2001: A Legislative Odyssey

• December 2001: Manny Miranda becomes staff attorney to the appointments section
“Hackers”

• March 2003: Computers replaced
“Hackers”

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• Lundell took > 4,000 files
“Hackers”

- March 2003: Computers replaced
- Lundell took > 4,000 files
- Senate allies, White House, and outside groups get copies, other information
“Memogate”
Was there a legal ethics violation:
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1. When Miranda orchestrated the copying of documents from Democratic staffers' hard drives?
Was there a legal ethics violation:

1. When Miranda orchestrated the copying of documents from Democratic staffers' hard drives?

2. When Miranda reviewed the documents?
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2. When Miranda reviewed the documents?

3. When Miranda reviewed committee documents on behalf of a legislator not on the committee?
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1. When Miranda orchestrated the copying of documents from Democratic staffers' hard drives?

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3. When Miranda reviewed committee documents on behalf of a legislator not on the committee?

4. When Miranda shared information gleaned from those documents with parties outside the legislature?
Was there a legal ethics violation:

1. When Miranda orchestrated the copying of documents from Democratic staffers' hard drives?
2. When Miranda reviewed the documents?
3. When Miranda reviewed committee documents on behalf of a legislator not on the committee?
4. When Miranda shared information gleaned from those documents with parties outside the legislature?
5. When Miranda shared the documents with a party outside the legislature?
Miranda says:
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- Party in litigation must exhibit due diligence in preventing the opposing party from seeing its documents.
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- Party in litigation must exhibit due diligence in preventing the opposing party from seeing its documents.

- These documents were not confidential, since they belong to the public and will be archived.
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- "I was not in a relation of confidence to the Senators or documents in question."
Who Is the Legislative Client?

- Rule 1.06(b), Texas Disciplinary Rules of Professional Conduct

... a lawyer shall not represent a person if the representation ...:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse ...; or

(2) reasonably appears to be or become adversely limited ....
Who Is the Legislative Client?

- Rule 1.06(c), Texas Disciplinary Rules of Professional Conduct

A lawyer may represent a client . . . if:

1. the lawyer reasonably believes the representation of each client will not be materially affected; and

2. each . . . client consents . . . after full disclosure . . .
Who Is the Legislative Client?

- Rule 1.09(a), Texas Disciplinary Rules of Professional Conduct

Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . if it is the same or a substantially related matter.
Who Is the Legislative Client?

Committees

- Employee of chairman?
- Subcommittee attorneys?
- Conference committees? Interim committees?
- Change in membership?
- Jurisdiction?
- Subsequent legislative steps?
Who Is the Legislative Client?

Member Offices

- Changing jobs?
- Legislator retires?
Who Is the Legislative Client?

Legislative Agencies
Organization as a Client

Rule 1.12, Texas Disciplinary Rules of Professional Conduct

Organization as a Client

(a) A lawyer employed or retained by an organization represents the entity. . . . [T]he lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity’s duly authorized constituents . . . .

* * *

(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.
Who Is the Legislative Client

Client = Legislature
Who Is the Legislative Client?

- Previous legislatures?
Government Organization as a Client

Rule 1.12, Texas Disciplinary Rules of Professional Conduct

Comment 9
The duty defined in this Rule applies to governmental organizations. . . . [D]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. . . .
Best(?) Approach

- Who directs your work?
- Laws?
- Policies?
- Expectations?
- Communicate
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5. When Miranda shared the documents with a party outside the legislature?
So, what did they do?

Civil Cause of Action?

- Damages?
- Who is the plaintiff?
- Cause of action?
- Politics!
So, what did they do?

Criminal Prosecution?

- Hacking--"Whoever intentionally accesses a computer without authorization or exceeds authorized access, ...." 18 U.S.C. § 1030(a).
So, what did they do?

Bar Grievance?

- Rule 1.05(b), Texas Disciplinary Rules of Professional Conduct:

  - [A] lawyer shall not knowingly:

    1. Reveal confidential information of a client or a former client to...anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

    2. Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

    ***

    4. Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.
So, what did they do?

Bar Grievance?

- Rule 8.04(a), Texas Disciplinary Rules of Professional Conduct:
  - A lawyer shall not:
    1. violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
    2. commit a serious crime, or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
    3. engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .
So, what did they do?

Speech or Debate Clause!
Other considerations

Transition
Other considerations

Opinion 665, Texas Bar
Other considerations

Rules 5.01 and 5.03, Texas Disciplinary Rules of Professional Conduct
Other considerations

Protecting the Organization
Complete list of career-damaging process filed:
Epilogue

Left congressional employment in summer 2003.
Epilogue

Now an intellectual property attorney, specializing in information technology.
Epilogue


Lundell
Epilogue

Lundell

Now, a CPA, specializing in fraud prevention.
Epilogue

- **Miranda**
Epilogue

Miranda

- Helped design Iraqi parliamentary system.
- Reformed the Iraqi and Kurdistan Region bars.
- International finance and project development attorney.
Echoes from the past
Echoes from the past

Imran Awan
Echoes from the past

Brett Kavanaugh
Tools to help you
Session Tools

Texas Legislature Online
Session Tools

Legislative Archive System
Session Tools

Texas Legislative Council
MEMORANDUM

TO: Members of the 85th Legislature

FROM: Jeffrey J. Thorne
Deputy Director, Legal Division
Christopher Clapham
Legislative Counsel
Trey Burke
Legislative Counsel

DATE: January 16, 2017

SUBJECT: Local and Special Bills, Notice Requirements for Local and Special Bills, and Bracket Bills
Session Tools

Texas House Research Organization
FLOOR AMENDMENT NO. ______

BY: [Signature]

Amend H.R. No. 3 (Adopting the Housekeeping Resolution for
the House of Representatives of the 86th Legislature) on page 23,
by striking lines 11 through 15 and substituting the following:

SECTION 5.04. MONTHLY CREDIT. (a) Each member's operating
account shall be credited with:

1. In Fiscal Year 13, $15,230 ($44,260) for each month
that falls wholly or partly during the regular legislative session
or a special legislative session, and in any other month,
[each member's operating account shall be credited] with $13,500.
Fin.